

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANGELA M. WINCHESTER

Claimant

VS.

SOUTHWESTERN BELL TELEPHONE COMPANY

Respondent

Self-Insured

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Docket No. 211,752

ORDER

Claimant appealed a preliminary hearing Order entered by Administrative Law Judge Floyd V. Palmer dated June 27, 1996, that denied preliminary compensation benefits.

ISSUES

The Administrative Law Judge found claimant had failed to prove that her accidental injury arose out of and in the course of her employment with the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The issue raised by the respondent is an issue that grants the Appeals Board jurisdiction to review a preliminary hearing Order. See K.S.A. 44-534a, as amended.

On April 11, 1996, claimant was employed by the respondent as a service representative located in the Southwestern Bell Telephone Building at 823 Quincy, Topeka, Kansas. For preliminary hearing purposes, the respondent stipulated that the claimant injured her back when she was knocked down by a bale of insulation that had blown off a

truck located in the alley immediately south of the respondent's building. Claimant was injured at approximately 11:55 a.m. while she was on her regular scheduled lunch break from 11:30 a.m. to 12 noon. Claimant had left respondent's building for lunch and was returning when the accident occurred. At the time of claimant's injury, she had not yet resumed performance of her regular duties associated with her employment.

Since claimant was returning from her lunch break when injured, the claimant's injury is subject to the "going and coming" rule contained in K.S.A. 1995 Supp. 44-508(f). The "going and coming" rule is stated in K.S.A. 1995 Supp. 44-508(f) as follows:

"The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. The words, 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer."

As previously noted, claimant was injured as she was returning from her lunch break prior to resuming her duties of employment. Therefore, in order for claimant's accidental injury to have arisen out of and in the course of her employment, one of the exceptions contained in the "going and coming" rule would have to be proved. In this case, claimant argued that she was injured on the respondent's premises which is an exception to the "going and coming" rule. Respondent, on the other hand, argued that the preliminary hearing record did not establish that the alley where claimant was injured was the respondent's premises.

The narrow issue to be decided is whether the alley located south of the respondent's building is the premises of the respondent. The Administrative Law Judge denied claimant preliminary hearing benefits finding claimant was not on respondent's premises at the time of her injury. In order for a place to be construed as the respondent's premises, within the meaning of the term contained in K.S.A. 1995 Supp. 44-508(f), it has to be established that such place is controlled by the employer. See Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, Syl. ¶ 1, 883 P. 2d 768 (1994). The Appeals Board finds that claimant's testimony and photographs admitted into evidence at the preliminary

hearing proceedings failed to prove that the alley where claimant was injured was either owned by or under the control of the respondent. Accordingly, the Appeals Board finds that the preliminary hearing Order of the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Floyd V. Palmer dated June 27, 1996, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

c: James L. Wisler, Topeka, KS
Michael C. Cavell, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director